IN THE

Supreme Court of the United States

OCTOBER TERM 1952

NO. 219

MAPLE ISLAND FARM, INC.,

Petitioner,

vs.

WALTER BITTERLING,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROLAND J. FARICY
Attorney for Respondent
FARICY, BURGER, MOORE & COSTELLO
W-2662 First National Bank Building
Saint Paul, Minnesota
Of Counsel

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BASIS OF JURISDICTION

Defendant seeks to invoke the jurisdiction of this Court under the provisions of 62 Stat. 928 (1948), 28 U. S. C. A. Sec. 1254 (1) (1948) which reads in part as follows:

> "Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *"

Since this writ is sought in order to obtain a review of the decision made by the Court of Appeals, it appears that Defendant is asking this Court to treat that decision as if it were a judgment. Whether the Court of Appeals' decision on this fragmentary appeal is a judgment and whether it is a final judgment is not entirely clear, but Plaintiff does not wish to belabor the point further than to invite the Court's attention to Plaintiff's earlier brief in opposition to Defendant's "piecemeal" appellate procedures. (See R. 8 to 18)

A few additional matters deserve discussion in connection with the jurisdictional problems presented by this petition. It is important to consider that Defendant, upon submitting this petition to the highest Court in the land, has now run the entire gamut of the Federal Appellate Court system seeking the special and unprecedented privilege of a "piecemeal" review of its case on an issue which it did not regard as being of sufficient importance to press in the Trial Court until after an adverse decision on the merits. (R. 82) At no time during the extended trial of this action did Defendant actively contest the issue of jurisdiction. When Defendant submitted a lengthy brief after trial it purported to and did

set forth and exhaustively discuss all issues in the case. (R. 11) In that brief, neither Plaintiff's citizenship nor the issue of jurisdiction were mentioned. (R. 11) Furthermore Defendant without any reservation of a challenge on jurisdiction asserted, proved, and submitted proposed findings asking (and was granted) judgment on a counterclaim against Plaintiff (R. 11, 62).

It is fundamental, of course, that jurisdiction in the Federal Courts is always in issue whether affirmatively raised by the pleadings, whether actively contested or whether wholly ignored in all previous proceedings. Obviously, if Federal jurisdiction does not exist in fact,[1] no act or omission of the parties or their counsel at any step in the action can serve to remedy the fatal defect. However, this Court has indicated that the timeliness of an objection to jurisdiction is definitely a factor to be considered in passing upon the issue at any later stage in the action. In *Deputron v. Young,* 134 U. S. 241, 252, 10 S. Ct. 539, 543, 33 L. Ed. 923 (1890), this Court, in considering a case which involved a tardy objection to jurisdiction, stated:

> "* * * we remark in passing that such an objection (to jurisdiction) ought to be raised at the first opportunity and delay in its presentation should be considered in examining into the grounds upon which it is alleged to rest."

In *Simpson v. Phillipsdale Paper Mill Co.,* 223 Fed. 661, 663, (D. C. Mass 1915) the Court commented on the *Deputron* case, *supra,* and stated:

[1] Federal Courts have emphasized that it is the fact of diversity, with which they are most concerned. Hence it is interesting to note that the Court of Appeals, while affirming the finding on Plaintiff's Oklahoma domicile and citizenship commented that it might have found that he was domiciled in New York. (R. 97)

> "In Deputron v. Young many months had gone by since the case was at issue, and it had been tried on the merits and decided against the petitioner *before the petition to dismiss was filed.* Obviously, under such circumstances, every doubt as to the jurisdiction ought to be resolved in favor thereof." (Italics supplied.)

Plainly the Federal Courts have expressed displeasure and disapproval of a party who in a sense sails forward on the merits while silently saving an objection to the Court's jurisdiction as an "anchor to windward" should he lose on the merits. *Parker Washington Co. v. Cramer,* 201 Fed. 878 (7th Cir. 1912)

ARGUMENT AND AUTHORITIES

INTRODUCTION

Defendant's petition for certiorari asserts that in this case the decision of the Court of Appeals is in conflict with the decisions of this Court and with the decisions of the Federal Appellate Courts in other circuits on (1) the scope of appellate review in Court tried cases and (2) the presumptions governing determination of citizenship. For good measure, Defendant's petition asserts that the Trial Court's finding on citizenship is not supported by the evidence. We do not understand the latter claim to be a ground for seeking certiorari.

The ultimate purpose of Defendant's Petition is to have this Court review the evidence to determine whether it is sufficient to sustain the finding that Plaintiff was a citizen of Oklahoma when this action was commenced in January, 1949.

One District Judge, who heard the case for nearly seven weeks, was persuaded that Plaintiff was a citizen of Oklahoma and so found. (R. 61) When the finding on this issue was challenged by Defendant *after* judgment and Plaintiff moved to reopen for the taking of additional evidence if there was any doubt on the point, the Trial Judge vigorously reaffirmed his finding. (R. 62, 63, 82, 83) Three Court of Appeals' judges, who thereafter reviewed this issue, separated from all other issues in the case, affirmed the District Court. (R. 89, 90-98) When the soundness of its decision was challenged by a Petition for rehearing, the Court of Appeals denied the Petition summarily without opinion. (R. 99-115) Furthermore, Defendant's own able counsel appear to have once shared the conclusion that Defendant's Oklahoma citizenship was abundantly proved, since Defendant's comprehensive brief in the Trial Court failed even to mention, let alone argue, jurisdiction or diversity. (R. 10, 11)

I. The Scope of Review in Court Tried Cases

Since this case was tried by the Court without a jury, the scope of review exercised by the Court of Appeals was governed by Rule 52 (a) of the Federal Rules of Civil Procedure which provides in part that:

> "* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses * * *"

One of the leading United States Supreme Court cases construing rule 52 (a) is *United States v. Yellow Cab Co.*, 338 U. S. 338, 70 S. Ct. 177, 94 L. Ed. 150 (1949), which is

cited in the Court of Appeals' decision. (R. 96) In that case, this Court held that a party may not come to an Appellate Court for what virtually amounts to a trial *de novo* on the record of such findings as *intent,* motive and design and that a finding is not clearly erroneous where the evidence would support a conclusion either way but where the Trial Court has decided it to weigh more heavily for one of the parties. The *Yellow Cab Co.* case, involving as it did a matter of intent, is clearly in point on the present case where, the fact of a business residence in Caracas for less than one year preceding this action being admitted, the determination of Plaintiff's Oklahoma citizenship rested primarily upon determining Plaintiff's intention. In following the decision of this Court in the *Yellow Cab Co.* case, the Court of Appeals' decision was completely in accord with (and not contrary to) the latest decisions of this Court[2] and with the decisions in other circuits.[3]

The nature of the evidence in this case is such that the determination of Plaintiff's citizenship was a matter peculiarly within the province of the trier of fact. The evidence is largely Plaintiff's own activities and testimony. At the trial Defendant took some pains to challenge Plaintiff's credibility generally. The evidence upon which Defendant places principal reliance is made up of certain documents and testimony which contain ambiguous language. Since the evidence on Plaintiff's intention was necessarily circumstantial, the Trial Court was obliged to draw many infer-

[2] See also, *Timken Roller Bearing Co. v. United States,* 341 U. S. 593, 71 S. Ct. 971, 95 L. Ed. 1199 (1951); *United States v. National Ass'n. of Real Estate Bds.,* 339 U. S. 485, 70 S. Ct. 711, 94 L. Ed. 1007 (1950).

[3] *Remington Rand, Inc. v. Societe Internationale,* 188 F. (2d) 1011, 1013 (App. D. C. 1951); *Mine Hill & Schlylkill Haven R. Co. v. Smith,* 184 F. (2d) 422, 426 (3rd Cir. 1950); *United States v. Fotopulos,* 180 F. (2d) 631, 634 (9th Cir. 1950); *Widney v. United States,* 178 F. (2d) 880 (10th Cir. 1949)

ences from the evidence to determine Plaintiff's intention. The drawing of inferences is the very essence of appraising and using circumstantial evidence.

It must also be remembered that this was a long trial. It lasted nearly seven weeks. Numerous witnesses were heard and their testimony covers approximately 3000 pages of transcript. An estimated 2000 pages of exhibits were considered. In hearing and considering all of the evidence in the case, including the evidence on the merits, the Trial Judge acquired a wealth of detailed background information on Plaintiff's activities during the period which is important to a determination of his citizenship. He also gained a keen insight into the nature of Plaintiff's work, his manner of thinking and speaking, his habits, his attitudes and manner of living. In short, he had the best possible frame of reference into which he could fit the specific evidence that enabled him to determine Plaintiff's true intention as it affected his domicile and citizenship. By the same token he was in the best possible position to give words of testimony and language of documents the meaning they appeared to have in the context of the entire case. He was able to draw his inferences from all the evidence in the case. Having been thus uniquely situated and having lived with the facts of this case through a long trial, the Trial Judge had the best possible basis for judging credibility, resolving ambiguities of language, drawing inferences and arriving at a correct determination on Plaintiff's intention. It is impossible to produce a record here that will place the Appellate Courts in a position equivalent to that enjoyed by the Trial Judge.

In refusing to draw inferences and resolve ambiguities differently from the Trial Judge, the Court of Appeals fol-

lowed the latest decisions in this Court. In *United States v. National Ass'n. of Real Estate Bds.*, 339 U. S. 485, 70 S. Ct. 711, 94 L. Ed. 1007 (1950), this Court held that it could not set aside a finding merely because it might give the facts another construction or resolve the ambiguities differently from the Trial Judge. In *Timken Roller Bearing Co. v. United States*, 341 U. S. 593, 71 S. Ct. 971, 95 L. Ed. 1199 (1951), this Court refused to set aside the findings of the Trial Court where the essence of the dispute was on the proper inferences to be drawn from the evidence in the record. This Court further held that a request to review the propriety of the inferences drawn by the Trial Court was in effect an invitation to try the case *de novo*, an unacceptable invitation.

In its brief, Defendant seeks to show that the Court of Appeals' decision conflicts with the decisions in other circuits because the court did not, upon its review of the facts, substitute its judgment for that of the Trial Court and draw its own inferences and conclusions from the evidence. Defendant urges that where there is no controversy on the weight of the evidence or on matters of credibility and the facts are undisputed, an appellate court is obliged to exercise an independent judgment and draw its own inferences and conclusions. We have already pointed out (1) the facts on Plaintiff's citizenship *are* disputed; (2) there *is* considerable controversy as to the weight of the evidence; (3) there *is* a dispute on matters of credibility, and (4) much of the evidence relied upon by Defendant is ambiguous and equivocal. In those circumstances, the Court of Appeals had no occasion to consider the rule for which Defendant contends. In any event, the rule as stated in Defendant's brief is not in accord with the decisions in any circuit. Although, on the facts

assumed by Defendant, courts have held that the inferences drawn by the Trial Court are not conclusive, no court—including those whose decisions are cited on page 12 of Defendant's brief—has held that inferences drawn or findings made by a Trial Court from undisputed evidence are subject to a *full* review and the *exercise of independent judgment.* Some review there may be, but it is not a full review with an exercise of independent judgment as upon a trial *de novo.* The correct statement of the rule is found in 3 Am. Jur. (Appeal & Error) Sec. 903:

> "The rule that findings upon undisputed or unconflicting testimony do not carry the same weight as those based upon probative disputed facts *applies only where but one conclusion can reasonably be drawn from the evidence.* Findings based upon undisputed evidence from which different or conflicting inferences may reasonably be drawn are as conclusive on the appellate court as though based directly on conflicting evidence." (citing numerous cases) (Italics supplied.)

The rule is similarly stated in 5 C. J. S., Appeal and Error, 1656 (h).

II. Review of Mixed Questions of Law and Fact

In a further attempt to extend the scope of appellate review into the realm of trial *de novo* Defendant has devoted considerable space in its brief to the proposition that citizenship is a mixed question of law and fact and to the contention that on such a question an Appellate Court will give a full review complete with exercise of independent judgment. The authorities do hold that domicile or citizenship is a mixed question of law and fact, but the Courts, including the

Court of Appeals in the present case, hold that it is mainly a question of fact.[4] No authority has been found for the proposition that fact issues are to be tried in Appellate Courts. The problem of what is law and what is fact and the problem of coping with mixed questions of law and fact are not amenable to an easy solution. However, it is easy to say what is *not* the correct solution. The solution is not to treat law as fact or fact as law. A mixed question of law and fact—by definition—is not all law and is not to be reviewed as such. The correct rule on review of mixed questions is the one followed by the Court of Appeals in this case when it held that on a mixed question of law and fact the determination of the fact is for the trier of fact and such determination will not be reversed unless "clearly erroneous." (R. 96)

This rule is completely in accord with the decision of this Court in *First National Bank v. Hartford,* 273 U. S. 548, 47 S. Ct. 642, 71 L. Ed. 767 (1927), which is cited on page 11 of Defendant's brief. There this Court stated: (273 U. S. 552, 47 S. Ct. 463)

> "The question is thus a mixed one of law and fact, and in dealing with it we may review the facts *in order to correctly apply the law.*" (citing cases) (Italics supplied.)

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[4] *Maple Island Farm, Inc. v. Bitterling,* 196 F. (2d) 55 (8th Cir. 1952) (R. 96); *Chicago and N. W. Ry. Co. v. Ohle,* 117 U. S. 123, 6 S. Ct. 632, 29 L. Ed. 837 (1886); *Philadelphia and Reading Ry. Co. v. Sherman,* 230 Fed. 814 (2d Cir.); *Hopkins v. Comm'r.,* 320 Mass. 168, 68 N. E. (2d) 669 (1946); *Beasley v. Beasley,* 93 N. H. 446, 43 A. (2d) 154 (1945); *Bailey v. Bailey,* 93 N. H. 259, 40 A. (2d) 581 (1945); *Ratkowsky v. Browne,* 267 App. Div. 643, 47 N. E. (2d) 905 *appeal denied* 268 App. Div. 835, 50 N. Y. S. (2d) 464 (1944); *Kroehnke v. Gold Creek Mining Co.,* 102 Mont. 21, 55 P. (2d) 678 (1936); *Squire v. Vasquez,* 52 Ga. App. 712, 184 S. E. 629 (1936).

This Court did not say that upon review it would exercise an independent judgment on the facts. If the decision is read in full it discloses that although the law was fully reviewed, *the finding of the Trial Court was reviewed only for the purpose of determining whether it was supported by the evidence.* Furthermore, an examination of the decisions cited in the *First National Bank* case as authority for reviewing the facts in a mixed question of law and fact, clearly shows that the sole purpose of such review is to determine whether under correct rules of law, the evidence is sufficient to warrant the determination made or whether, on the contrary, the determination is so clearly erroneous that it cannot be permitted to stand. See also *United Gas Public Service Co. v. State of Texas,* 303 U. S. 123, 58 S. Ct. 483, 82 L. Ed. 702 (1937).

III. Legal Presumptions Governing Citizenship

Defendant's assignment of error on this subject rests upon a mistaken conclusion as to the legal presumptions applied by the Court of Appeals. The confusion apparent in this assignment of error arises from the failure of Defendant's counsel to reconcile the presumptions which govern the determination of domicile and citizenship. It is well settled that, nothing more appearing, the place where a person lives is, *prima facie,* presumed to be his legal domicile.[5] It is equally well settled that a domicile once acquired is presumed to continue, and that the burden of proving a change rests upon

[5] See cases cited on Page 12 of Defendant's brief.

the party alleging it.[6] However, it must be understood that the presumption as to continuance of original domicile can be rebutted by the presumption of domicile at a place of subsequent residence *only if* such residence is wholly inconsistent with an intent to return to the original domicile.[7] In the present case, Defendant makes the unfounded assumption that the Court of Appeals failed to recognize and consider the presumption of domicile from residence. On the contrary it is apparent that the Court of Appeals considered this presumption but was convinced upon the record that it did not apply because there was abundant evidence to show that Plaintiff's presence in Venezuela, North Africa, New York and elsewhere was occasioned solely by the nature of his work *and was not inconsistent with retention* of his *Oklahoma* citizenship.

In declining to give controlling effect to the presumption urged by Defendant, the Court of Appeals was merely recognizing that Plaintiff's temporary residence in Venezuela on business[8] did not raise a presumption that his domicile had changed to that country. This was clearly in accord with the decision of this Court in *Ennis, Admr. v. Smith et al.*, 14

[6] *Ennis v. Smith*, 14 How. 400, 14 L. Ed. 472 (1852); *Mitchell v. United States*, 21 Wall. 350, 22 L. Ed. 588 (1874); *Anderson v. Watts*, 138 U. S. 694, 11 S. Ct. 449, 34 L. Ed. 107 (1891); State of Texas v. State of Florida, 306 U. S. 398, 59 S. Ct. 563, 83 L. Ed. 817, 121 A. L. R. 1179 (1939); *Sweeney v. District of Columbia*, 113 F. (2d) 25 (App. D. C. 1940); Shilkret v. Helvering, 138 F. (2d) 925 (App. D. C. 1943); *Welsh v. American Surety Co. of N. Y.*, 186 F. (2d) 17 (5th Cir. 1951).

[7] *Ennis v. Smith*, 14 How. 400 14 L. Ed. 472 (1852); *United States v. Knight*, 291 Fed. 129 (D. C. Mont. 1923) *aff'd.*, 299 Fed. 571 (9th Cir. 1924); 19 C. J., Domicile, § 67b.

[8] It must be remembered that, at Defendant's request, Plaintiff left Venezuela in 1947 and went to New York to help promote and manage International Trade Service, Inc., and that from then until April 1948, he travelled in Mexico and the Caribbean Islands for that new company. In April 1948 Defendant sent Plaintiff to Venezuela under an entirely new contract which in turn was cancelled seven months later, giving rise to this suit. (R. 86, 87, 88) Plaintiff had gone to Venezuela under the contract in suit only nine months prior to commencing this case.

How. 400, 14 L. Ed. 472 (1852), cited on page 12 of Defendant's brief. There it was held that the place of residence is *prima facie* the domicile *unless* it appears that the residence is for some particular purpose expected to be only of a temporary nature, *or* in the exercise of some particular profession, office or calling. In such a case the presumption of domicile from residence does not apply. Here there was abundant evidence to show that Plaintiff's various residences outside Oklahoma were merely temporary *and* in the exercise of his calling as an export trade specialist and for sales promotion in foreign markets.

IV. Burden of Proof on Issue of Citizenship

The burden of proof in this case is best explained by the following quotation from 17 Am. Jur., Domicile, 640:

> "The rule is well settled that the burden of proving change of domicile is on the person who alleges it. If a party's right to affirmative relief depends on showing that his domicile has been changed, clearly the burden of proof as to the issue is on him. If, on the other hand, his right to relief depends on showing the continuance of domicile in a particular place, *then a showing that he once resided in the place makes out a prima facie case.* The presumption casts upon the other party the duty of going forward with the evidence to meet the prima facie case created thereby."

Since Plaintiff's right to affirmative relief was dependent upon his proving all jurisdictional facts, Plaintiff had the burden of proving his allegation of Oklahoma citizenship. His burden was to prove a *prima facie* case. He did so to

such an extent that the matter stood unquestioned by anyone until *after* judgment. (R. 82)

When the duty fell to Defendant to go forward with the evidence to rebut Plaintiff's *prima facie* case, no evidence was offered. In the absence of contest, there was no occasion for Plaintiff to offer more than the minimum required to prove his *prima facie* case. After judgment, Defendant seized upon the fact that Plaintiff had resided outside Oklahoma and then *for the first time* sought to assert that he had thereby lost his domicile and citizenship in Oklahoma. Defendant clearly failed to carry its burden of going forward with the evidence to meet Plaintiff's *prima facie* case.

The Court of Appeals' opinion shows that in judging the sufficiency of the evidence on this issue, the following well settled rules were considered: (R. 96)

1. That the burden of proving a change of domicile from Oklahoma to Venezuela rested on Defendant, the party alleging it. (See footnote 6, *infra*).

2. That proof of a change of domicile must be clear and convincing.[9]

3. That more evidence is required to establish a change of domicile from one nation to another than from one state to another.[10]

4. That less evidence is required to prove a continuity of Oklahoma citizenship and domicile than to establish a new domicile.[11]

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[9] *Sweeney v. District of Columbia*, 113 F. (2d) 25 (App. D. C. 1940); 28 C. J. S. Domicile, § 16.

[10] *United States Trust Co. v. Hart*, 150 App. Div. 413, *aff'd*, 208 N. Y. 617 (1912); In re *Lyon's Estate*, 117 N. Y. Misc. 189, 191 N. Y. Supp. 260 (1921); *McEwen v. McEwen*, 50 N. D. 662, 197 N. W. 862 (1924); *Lord v. Colvin*, 4 Drew 366, 62 Eng. Reprint 141 (1859); *Cruger v. Phelps*, 21 Misc. 252, 47 N. Y. Supp. 61 (1897). In the latter case the Court held that a change of domicile to a foreign country is so injurious to legal rights and relationships that it should be proved by the clearest and most convincing evidence.

[11] 28 C. J. S., Domicile, § 16.

In giving effect to these rules the Court of Appeals' decision in no way conflicted with the decisions of this Court.

Nor can any basis for a conflict of decisions be found in the Court of Appeals' statement that:

> "He [Plaintiff] was not asked and did not say as a witness that he intended to remain in Venezuela either indefinitely or permanently. His intention must be deduced, therefore, from all the circumstances in evidence."

If a man's intention with respect to his domicile is not expressly stated, how is it to be found except by deduction from all the circumstances in evidence? Certainly it should not be presumed from residence alone where the evidence as a whole shows that presumption to be incorrect. If a change of residence were the sole proof required to show a change of domicile, it would destroy the long standing rule that to constitute a change of domicile two things are indispensable:[12]

1. residence in the new locality, and
2. the intention to remain there.

If an intention to remain in Venezuela is requisite to showing a change of domicile to that country, no error of law can be found in the Court of Appeals' observation that Plaintiff did not at any time express such intention.

V. The Evidence is Clearly Sufficient to Prove Plaintiff's Oklahoma Citizenship

A mere summary of the evidence on Plaintiff's words and actions as they relate to his Oklahoma citizenship furnishes a complete answer to Defendant's belated and unsupported

[12] *Mitchell v. United States*, 21 Wall 350, 22 L. Ed. 588 (1874)

contention that there is insufficient evidence to sustain the finding that Plaintiff was a citizen of Oklahoma when this action was commenced in January of 1949.

1. Plaintiff answered one of Defendant's pre-trial interrogatories under oath and stated therein that his *permanent* residence was in Oklahoma. In the same answer he described Venezuela as merely his "place of residence"—omitting the word "permanent" in describing it. (R. 51)

2. On cross examination at the trial he again affirmed that his permanent residence was in Oklahoma and that he was merely residing in Venezuela, (R. 51) stating, "I am not a lawyer but I think that is true."

3. He came to Oklahoma as a small child, having been born in Montana. (R. 69)

4. He attended grade school in Oklahoma. (R. 69)

5. He attended high school in Oklahoma. (R. 69)

6. He attended night school at Tulsa, Oklahoma. (R. 69)

7. After he finished his schooling, he worked for many years as a secretary and stenographer for a business firm in Tulsa, Oklahoma. He continued in this work until 1935 when he was 30 years of age. (R. 69)

8. From 1935 until the early part of 1943, he worked on five different foreign assignments on three continents—North America, South America, and Africa—and in the Guineas and West Indies. He was employed by Tulsa, Oklahoma business firms on four of those five assignments. The fifth assignment was on work for the Export Division of International Harvester. (R. 84, 85)

9. During 1943 and part of 1944, he was employed by the United States government and sent to Venezuela on a special assignment. (R. 85)

10. During the rest of 1944 and part of 1945, he engaged in work which consisted largely of working in the United States to secure and expedite shipment of American trucks and automobiles to a Venezuela employer. (R. 85)

11. From 1945 to October of 1948, he was engaged in work for Defendant and given assignments requiring travel and work in Mexico, Venezuela, the Caribbean, Puerto Rico, Cuba, New York City and other parts of the United States. (R. 85 through 88)

12. When Defendant cancelled Plaintiff's employment contract in October of 1948, Plaintiff secured counsel in Minnesota and in January of 1949 commenced this action. (R. 88)

The foregoing evidence shows that Plaintiff has had a long and strong attachment to Oklahoma. It shows that Plaintiff, who was age 45 at the time of trial,[13] had spent approximately two-thirds of his life in Oklahoma. It shows that he was employed by Tulsa business firms until he was 38 years of age. Although the evidence shows that, in the exercise of his calling as an export specialist and salesman in foreign trade, Plaintiff was required to travel widely and frequently to live and work in foreign countries to carry out various business projects and assignments, there is nothing to show that he chose to abandon his Oklahoma citizenship or take up a domicile in any of the places he worked or travelled.

With respect to the evidence on Plaintiff's work and travel outside Oklahoma it must be remembered that

> 1) "An American citizen does not become a permanent resident of a foreign country by simply taking employment there with an American firm, however long

[13] R. 69

his employment may continue.[14] *United States v. Knight,* 299 Fed. 571, 574 (9th Cir. 1924) *affirming,* 291 Fed. 129 (D. C. Mont. 1923)

2) A removal from the existing domicile does not work a change or forfeiture of it where it can be shown or inferred from the circumstances that the removal is for a particular purpose expected to be only of a temporary nature, or in the exercise of some particular profession, office or calling. *Ennis v. Smith, et al.,* 14 How. 400, 14 L. Ed. 472 (1852).

3) A person does not lose his citizenship and domicile merely by taking up a residence at a place the United States Government sends him to serve. *Sweeney v. District of Columbia,* 113 F. (2d) 25, 22 App. D. C. 30, 129 A. L. R. 1370 *cert. denied,* 310 U. S. 631, 60 S. Ct. 1082, 84 L. Ed. 1402 (1940); *Pace v. District of Columbia,* 135 F. (2d) 249, 77 App. D. C. 332 aff'd, 320 U. S. 698, 64 S. Ct. 406, 88 L. Ed. 408 (1943).

4) A person does not lose his existing domicile and citizenship by taking up a residence at a place where he is employed by others to work on a project or assignment of limited duration. *Butler v. District of Columbia,* 153 F. (2d) 617 (App. D. C. 1945); *Watters v. Ralston Coal Co.,* 38 F. Supp. 16 (D. C. Pa. 1941); *Hines, Dir. Gen. of Railroads v. Gaines,* 192 Ky. 198, 232 S. W.

[14] The cases are legion in which American and English Courts have held that long periods of residence did not work a change of domicile or citizenship. *Hodgson v. De Beauchesne,* 12 Moore P. C. C. 285, 14 Eng. Reprint 508 (1858) [23 years]; *Jopp v. Wood,* 34 Beav. 88, 55 Eng. Reprint 566 (1864) *aff'd* 4 De G. J. & S. 616, 46 Eng. Reprint 1057 (1865) [25 years]; *Capdeville v. Capdeville,* 2 H. & C. 985, 21 L. T. (N. S.) 660 (1869) [20 years;] *In Goods of West,* 6 Jur. (N. S.) 831 (1860) [14 years]; *Douglas v. Douglas,* 41 L. J. Ch. 74, L. R. 12 Eq. 617, 25 L. T. 530 (1871) [a lifetime]. *Jopp v. Wood and Capdeville v. Capdeville, supra* are cited with approval in *Harding v. Standard Oil Co.,* 182 Fed. 421, 425 (C. C. N. D. Ill. 1910).

United States Trust Co. v. Hart, 150 App. Div. 413, *aff'd* 208 N. Y. 617 (1912) [27 years]; *Dupuy v. Wurtz,* 53 N. Y. 556 (1873) [11 years]; *N. Y. Life Ins. & Trust Co. v. Viele,* 161 N. Y. 11, 55 N. E. 311, 76 Am. St. Rep. 238 (1899) [30 years]: *In re. Lyon's Estate,* 117 N. Y. Misc. 189, 191 N. Y. Supp. 260 (1921) [20 years]; *Sproat v. Hall,* 189 Mich. 28, 155 N. W. 361 (1915) [15 years]

624 (1921); *Bethlehem Steel Co. v. Traylor,* 158 Md. 116, 148 Atl. 246, 73 A. L. R. 479 (1930).

Now Defendant has left no page unturned (out of a total Record of nearly 5,000 pages) in its efforts to show that the evidence weighs more heavily for the position which Defendant has taken. In this effort, Defendant has gleaned every scrap of equivocal evidence and attempted to turn it to the purpose of showing that Plaintiff had some supposed permanent attachment to Venezuela.

Plaintiff, of course, has had extensive business experience in Venezuela and in all Latin American countries. As an export specialist and salesman in foreign trade, Plaintiff has gone where his work has taken him. Since Plaintiff is expert in Latin American trade, he has spent and will probably continue to spend some time periodically in South America, Mexico and other foreign areas. It should be noted however, that much of Plaintiff's business activity in Latin America is no different from that of Defendant when it took a 49% interest (through the person of Hadrath, its vice president) in the Venezuelan Corporation Distribuidora Valle Verde. Although Defendant's brief paints an hyperbolic picture of Plaintiff engaging in vast proprietary activities headquartered out of Caracas, the true picture is that none of his business activities in Venezuela, except powdered milk, have involved actual participation in active management of any business.

Although Defendant places great significance on Plaintiff's casual use of the word "home" in referring to his place of abode when he was working in Venezuela, it is manifest that no intention to remain in Venezuela can be spelled out of these references. Plaintiff also referred to his mother's

place of residence, and his overnight hotel room in Stillwater, Minnesota as "home." (R. 50, 51, 75) The important fact is when he was called upon by Defendant's counsel to make a distinction, he characterized Oklahoma as his *permanent* residence and Venezuela merely his residence (R. 51)

Defendant places great reliance on the fact that Plaintiff paid taxes in Venezuela and secured a divorce there. It is of course elementary that a person may be required to pay income taxes in a foreign country irrespective of his citizenship, nationality or domicile. It is equally elementary that the residence required to secure a divorce is not the same as citizenship and that a person may secure a divorce in a place where he has neither domicile nor citizenship. *Harding v. Standard Oil Co.*, 182 Fed. 421 (C. C. N. D. 1918) Defendant made no attempt to prove that Venezuelan law requires any special length or kind of residence in Venezuela as a basis for divorce jurisdiction. It is of course well settled that a person may retain his domicile at a place where he has no dwelling. *Restatement, Conflict of Laws*, Sections 9b and 16d (1934).

CONCLUSION

Defendant, having engaged Plaintiff in business assignments which required him at various times to go to Mexico, to Minnesota, to Venezuela, to the Caribbean Islands, and to New York, should not now be heard to assert that Plaintiff's fulfillment of these business obligations worked a forfeiture of his Oklahoma citizenship, and his access to the Federal Courts.

An examination of the Record submitted shows that the finding on Plaintiff's citizenship is not "clearly erroneous" and that there is no conflict on any rule of law followed by the Court of Appeals. Consequently, Plaintiff prays that the Defendant's Petition be denied.

ROLAND J. FARICY
Attorney for Respondent
FARICY, BURGER, MOORE & COSTELLO
W-2662 First National Bank Building
Saint Paul, Minnesota
Of Counsel